SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 27 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1962

No. 441

ROBERT FREDERICK HUFF and WILLIAM CONSTANTINE NICHOLSON,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY FOR PETITIONERS

Nathan Witt,
P. O. Box 156,
New York 23, N. Y.,
Attorney for Petitioners.

Holvey Williams,
915 First National Building,
El Paso, Texas,
of Counsel.

INDEX

PA

I. The Substantive Offense .....

A. The Indictment .....

B. The Evidence .....

II. The Conspiracy Charge .....

A. The Indictment .....

B. The Evidence .....

Citations

Fasulo v. United States, 272 U. S. 620 .....

Lupipparu v. United States, 5 F. 2d 504 .....

Muench v. United States, 96 F. 2d 332 .....

Russell v. United States, 369 U. S. 749 .....

Thornton v. United States, 271 U. S. 414 .....

United States v. Mercer, 133 F. Supp. 288 .....

Williamson v. United States, 207 U. S. 42[illegible] .....

Wong Tai v. United States, 273 U. S. [illegible] .....

Supreme Court of the United States

October Term, 1962

No. 441

ROBERT FREDERICK HUFF and WILLIAM CONSTANTINE NICHOLSON,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY FOR PETITIONERS

I. The Substantive Offense

A. The Indictment

The petition (pp. 8-9) demonstrated that while the indictment charges a scheme to defraud Salim Abraham, the scheme which it describes is one to obtain money from him, not by deceit, but as the price for releasing his son from arrest.

The government replies to our analysis with a characterization. It says (p. 7) that the scheme charged "is fraudulent in its entirety." But the only allegation of fraud to which it can point (*ibid.*) is the false representation made to Nazry, not to Salim, for the purpose of luring the former to Mexico. It then cites cases (*ibid.*) to the

effect that since the gist of the offense consists in *devising a scheme* to defraud, it is unnecessary to allege or prove that the false pretenses contemplated by the scheme were in fact communicated to the intended victim. This principle has no application here. For the fatal flaw in the present indictment lies not so much in its failure to allege that false representations were made to Salim as in the fact that the scheme which it describes did not contemplate making false representations to him or deceiving him in any other way. Thus, it appears from the indictment that the scheme charged did not rest on deceit but on extortion as the means of obtaining money from the victim.

Accordingly, *Muench* v. *United States*, 96 F. 2d 332 (C. A. 8), cited by the government (pp. 10-11), is likewise beside the point. For the indictment in that case charged a scheme to deceive the victim by falsely representing that one of the defendants had given birth to his child. The defense argued, not that the indictment was defective, but that it appeared from the evidence that this fraud was so palpable that it could not have been intended to deceive. Here, however, the indictment is bad because it does not allege a scheme to defraud the victim in any manner, palpable or otherwise.

The government attempts to distinguish *Fasulo* v. *United States*, 272 U. S. 620, on the ground that the indictment there did "not charge anything in the way of fraud or deceit" (p. 10). That is not the fact. The *Fasulo* indictment alleged that "the scheme and artifice was that the defendants would write and send, through the post office establishment of the United States, certain letters to one Frank Lauricella, wherein they would pretend that they intended to and would kill and murder the said Laurincella," unless he paid them $2,000. See *Lupipparu* v. *United States*, 5 F. 2d 504 (C. A. 9).[1] Yet, the Court in

[1] This was the same indictment which the Court had before it in *Fasulo*. See the latter at 625.

Fasulo did not think it necessary to consider whether the representation made in the letters was true or false. It reversed the conviction because the nature of the scheme showed its dependence on the coercion of fear and not on deceit as the means for mulcting the victim. Since this is equally true of the scheme alleged in the present indictment, the decision in *Fasulo* is governing.

B. The Evidence[2]

The government asserts (p. 11) that the false representation made to Nazry to lure him to Juarez was alone sufficient to establish a scheme to defraud. But the scheme charged was a scheme to defraud *Salim*. And the government does not and cannot explain how a false representation not made to or designed to deceive the latter can serve as evidence of a scheme to defraud *him*.

The government also argues (pp. 11-12) that false representations made to Salim that Nazry had robbed Huff and had been legally arrested "were fairly embraced within the scheme charged" in the indictment. But the scheme which the indictment describes did not involve practicing any deceit on Salim. Accordingly, it could not embrace the particular statements on which the government now relies, assuming that each of them had been found by the jury to have been made, to have been false, and to have been a part of the scheme to defraud. Moreover, as our petition demonstrated (p. 10), none of these assumptions is warranted.[3]

---

[2] The lack of any evidence connecting Nicholson with the alleged scheme is discussed in connection with the conspiracy charge, *infra*.

[3] Petitioners' requested instruction on the subject of the Huff burglary, which the government criticizes (p. 11, n. 5), was less favorable to them than they were entitled to have. For the jury should have been told that if it found that Huff honestly *believed* Nazry to have been the burglar, petitioners could not be convicted of a scheme to defraud Salim by false representations as to Nazry's guilt.

II. The Conspiracy Charge

A. The Indictment

The petition argues (pp. 11-14) that the conspiracy count (R. 5-6) is defective because it fails to describe the nature of the alleged fraudulent scheme. The government replies (pp. 9-10) that, "Coming as it does after the six substantive offenses," the conspiracy count was sufficient and, moreover, that petitioners did not make "any showing that they were misled."

In the first place, as we have shown, the substantive counts do not charge a fraudulent scheme. Even if they did, an indictment is not a guessing game, and a defendant will not be left to deduce the nature of the offense with which he is charged in one count from the fact that it follows after other counts charging other offenses. And, of course, a defendant is not required to make a showing of prejudice from a vague indictment. Its vagueness is prejudicial *per se*, and this not only because it fails to inform him of the nature of the charge but also because it does not protect him against double jeopardy. Additionally, it "gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell v. United States*, 369 U. S. 749, 766. This is precisely what the government is attempting in the present case.

The government cites three cases which, as it says (pp. 8-9), hold that a conspiracy indictment "need not allege the objectives of the conspiracy in such detail as is required to charge a substantive violation." This is so because an agreement to commit a crime may leave some of the details for future determination. All that the gov-

ernment's cases hold is that details such as these need not be alleged.[4]

The vice in the present conspiracy count is not that it omits such details but that it fails to do more than give a generic description of the crime which was the alleged object of the conspiracy charged. Hence, the count is defective under the standards of *United States* v. *Cruikshank*, 92 U. S. 542, and the other conspiracy cases cited in the petition (p. 12).[5]

B. The Evidence

1. The government does not dispute the principle (Pet., pp. 14-15) that in a prosecution for conspiracy to use the mails or wires to defraud, an intent by each conspirator to use the mails or wires for that purpose must be proved. But in answer to our argument that there was no evidence to show such an intent on Nicholson's part, the government asserts (p. 13) that there was "ample evidence" to show that he and Huff agreed not merely that a telephone call be made but, more, that the telephone call should be between Juarez and El Paso.

The "ample evidence" on which the government relies turns out to be nothing except Nicholson's presence in the

[4] *E.g.*, the names of the individuals who would be solicited to make false entries of land as part of a conspiracy to suborn perjury in *Williamson* v. *United States*, 207 U. S. 425, 449, or the detailed duties of the Bureau of Animal Industry employees who were the victims of the conspiracy to commit assault in *Thornton* v. *United States*, 271 U. S. 414, 423. In *Wong Tai* v. *United States*, 273 U. S. 77, the remaining case cited by the government, the objection to the failure of the indictment to allege particulars was even less substantial.

[5] It is true, as the government states (p. 10, n. 3), that the indictment dismissed in *United States* v. *Mercer*, 133 F. Supp. 288, alleged no particulars of any kind. But the precise ground on which the indictment was found insufficient was (at 291) that "it fails to describe the fraudulent scheme." The present indictment is defective for the same reason.

Juarez restaurant "at the time of the meeting between Huff and Salim" on the morning of April 27, 1960 (Opp., p. 13).

It is true that the government also envelops this shred of circumstantial evidence in a cloud of speculation to show that the fraudulent scheme "reasonably required" the making of a telephone call from Juarez to El Paso (*ibid.*). But all this is speculative even as to Huff. As to Nicholson, it is speculation within a web of circular reasoning. Without an iota of evidence, direct or circumstantial, to show that Nicholson agreed to, intended, or concurred in the use of the telephone between Juarez and El Paso, the government resorts to a series of four inferences to show that Nicholson had "an implicit understanding" with Huff that the call to Salim be made (*ibid.*).

As for Nicholson's presence in the restaurant when Salim arrived, that is not even proof that he knew Huff had used the telephone at all, let alone that he knew whom Huff had called or the purpose of the call. In fact, the government's conclusion that Nicholson was in the restaurant when Huff made the call is itself an inference from two thin strands of circumstantial evidence—his own testimony that he was in the restaurant about ten minutes before Salim arrived and Salim's testimony that he got there about ten minutes after he received the call from Huff (Opp., pp. 13-14). This is a shaky foundation even for the conclusion that Nicholson was in the restaurant when the call was made. But, in any case, it is painfully insufficient as proof that Nicholson agreed to or concurred in the use of the wires between Juraez and El Paso in execution of the alleged scheme.

2. As to the proposition that Nicholson was partner to the substantive crimes or to the alleged conspiracy, the opposition (p. 12) does no more than summarize the three pieces of circumstantial evidence relating to him and makes no effort to meet our showing that these were wholly insuffi-

cient to establish that he participated in the alleged scheme or conspired to do so (Pet., pp. 16-18).

Respectfully submitted,

NATHAN WITT,
P. O. Box 156,
New York 23, N. Y.,
Attorney for Petitioners.

HOLVEY WILLIAMS,
915 First National Building,
El Paso, Texas,
of Counsel.